IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

WEDNESDAY, THE 17TH OCTOBER 2007 / 25TH ASWINA 1929

Crl.Rev.Pet.No. 3322 of 2005()

CRA.132/2001 of ADDL. SESSIONS COURT (ADHOC), KALPETTA
CC.464/2000 of JUDL.MAGISTRATE OF FIRST CLASS-II, MANANTHAVADY

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REVN. PETITIONER: COMPLAINANT:

MOIDUTTY, S/O. MAMMUTTY,
MEERANGADAN VEEDU, PADINHARATHARA P.O.,
VYTHIRI TALUK.

BY ADV. SRI.V.G.ARUN
SRI.T.R.HARIKUMAR

RESPONDENTS: APPELLANT/ACCUSSED:

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1. M.P. IBRAI, S/O. MOIDU,
MANNATH PUNNOLI HOUSE, VARAMBETTA P.O.,
PADINHARATHARA AMSOM.

2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. SRI.VARGHESE PREM
PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 17/10/2007, ALONG WITH CRRP NO. 3381 OF 2007 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V. Ramkumar, J.

Crl.R.P. No. 3322 of 2005

and Crl.R.P. No.3381 of 2007

Dated: 17-10-2007

O R D E R

Crl.R.P. 3381 of 2007 is filed by the accused in C.C. No. 464 of 2000 on the file of the J.f.C.M.-II, Mananthavady in a prosecution under Sec. 138 of the Negotiable Instruments Act, 1881. Crl.R.P. 3322 of 2005 is filed by the complainant in the said case. According to him the lower appellate court while ordering compensation under Sec. 357 (3) Cr.P.C. omitted to incorporate a default sentence..

2. The case of the complainant is that the accused borrowed a sum of Rs. 90,000/- from him and when the complainant demanded the amount back the accused issued a cheque bearing No. 340910 drawn on the Padinharethara branch of the Canara Bank and when the cheque was presented on 25-10-1997 through the collecting bank it was dishonoured as evidenced by Ext.P2 dishonour memo dated 21-10-1997 and thereafter the complainant issued Ext.P3 lawyer notice dated 1-11-1997 which was duly received by the accused who caused Ext.P6 reply notice dated 20-11-1997 raising untenable

contentions and the accused did not pay the amount within 15 days of receipt of the statutory notice. It was on the above allegations that the complaint was filed.

3. The defence set up by the revision petitioner right from Ext.P6 reply dated 20-11-1997 was that he had availed a loan of Rs. 30,000/- from the complainant who had altogether taken three cheques namely Cheque Nos. 340906 for a sum of Rs. 60,000/-, 340907 for an amount of Rs. 15,000/- and Ext.P1 cheque for Rs. 90,000/- as collateral security for the above loan and that subsequently the accused and the complainant settled the matter in the presence of mediators examined as DWs 1 and 2 for a sum of Rs. 60,000/- evidence by a written agreement dated 4-8-1997 the original of which was allegedly with the complainant. The revision petitioner produced Ext.D1 alleged to be the photostat copy of the original evidencing the above settlement but the same was not received in evidence or considered although DWs 1 and 2 were permitted to be examined. It is the contention of the revision petitioner that if Ext.D1 agreement was permitted to be marked and its contents were looked into it would evidence the subsequent settlement and it would have the effect of rebutting the presumptions under Sec. 118 (b) and 139 of the Negotiable Instruments Act. The

revision petitioner would contend that the courts below went wrong in not accepting Ext.D1 and not placing reliance on the contents of the same.

4. Advocate Sri. Arun on the other hand submitted that the complainant has emphatically denied the so called settlement as well as the agreement and that even though Ext.D1 is not admissible in evidence it being a photocopy, the trial court had adverted to the same in para 17 onwards of the judgment and had found against the contention of the revision petitioner. He submitted in the alternative that even assuming that there was such an agreement, the revision petitioner has committed breach of the terms and conditions thereunder justifying the complainant to prosecute him for the offence.

5. After hearing both sides and after perusing the records, I am of the view that the above defence set up by the revision petitioner does not appear to have been considered in its true perspective by the courts below. If as a matter of fact, there was a settlement arrived at as alleged by the defence and an agreement was also executed on 4-8-1997 settling the claims under the three cheques referred to above whereby the complainant had agreed to receive Rs. 60,000/- in lieu of the amounts covered by the three cheques and if the revision petitioner paid the said amount on or

before 5-11-1997 then the present prosecution would be misconceived . Moreover, such an agreement will definitely have the effect of rebutting the presumptions under Sections 118 and 139 of the N.I. Act. On a perusal of the record it is seen that on 6-10-2001 alleging that the complainant was in custody of the original of Ext.D1, the revision petitioner filed a petition under Sec. 66 of the Evidence Act calling upon the complainant to produce the original of Ext.D1. The endorsement on the petition shows that copy of the same was served on the complainant and the petition was posted on 16-10-2001 for filing objections. In the objection filed on 20-10-2001 complainant does not say that he is not in custody of the orignal. On 20-10-2001, the trial court closed the petitioner without any reasons for the same. Ext. D1 appears to be a photocopy of the original taken by mechanical process and constitute secondary evidence falling under Sec. 63 (2) of the Evidence Act. By filing a petition under Sec. 66 of the Evidence Act, the revision petitioner had laid the foundation for receiving secondary evidence. When the complainant has no case that he is not in custody of the original of the said agreement it was well within the right of the revision petitioner to adduce secondary evidence by producing the photostat copy and attempting to prove the contents by examining the witnesses thereto. C.M.P. 2355 of 2001 was filed by

accused for issuing summons to those witnesses. The trial court originally dismissed that application also on 7-4-2001. It was in Crl.M.C. 2893 ovf 2001 filed before this Court that this Court as per order dated 19-7-2001 directed the trial court to issue summons to the two witnesses and examine them. The effect of the order of this court was virtually to permit the revision petitioner to adduce secondary evidence by proving the contends of D1. It was thereafter that DWs 1 and 2 were examined before the trial court. Eventhough the trial court had provisionally marked Ext.D1 subject to proof, that court refused to look into the contents of Ext.D1 on the premise that it was not admissible in evidence. The said view taken by the trial court does not appear to be correct. Since the defence set up by the revision petitioner has not been considered by the courts below in the right perspective, the judgments under revision cannot be sustained. It is well settled that failure to look into the evidence available in the case amounts to an error of law. Similarly, if irrelevant and inadmissible evidence is admitted in evidence and allowed to form the basis for the conclusion that also gives rise to an error of law. The judgments of both the trial court as well as the lower appellate court are set aside and the matter will stand remitted to the trial court for fresh disposal in accordance with law.

The parties shall appear before the trial court wihout any further notice on 19-11-2007. Considering the fact that it is a sufficiently old case, the trial court shall make an earnest endeavour to dispose of the case expeditiously and at any rate within three months of date of receipt of a copy of this order. In as much as the both the judgments have been set aside there is no surviving sentence and consequently Cr.R.P. 3322 of 2005 has virtually become infructous and is dismissed as such.

V. RAMKUMAR, JUDGE.

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